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August 9, 1994

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

Via Messenger

Re: **GN Docket No. 93-252**
Implementation of Sections 3(n) and 332
of the Communications Act
Regulatory Treatment of Mobile Services

Dear Mr. Caton:

Submitted herewith on behalf of PCC Management Corp. ("PCC") are an original plus nine (9) copies of its Comments with respect to the above-referenced docket.

Kindly contact my office directly with any questions concerning this submission.

Respectfully submitted,

William J. Franklin
Attorney for PCC Management Corp.

Encs.
cc: PCC Management Corp.
Chief, Mobile Services Division
Deputy Chief, Land Mobile and
Microwave Division

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	**GN Docket No. 93-252**
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

COMMENTS OF PCC MANAGEMENT CORP.

PCC Management Corp. ("PCC"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby files comments with respect to the Commission's Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] PCC's comments are focused on the Commission's regulatory treatment of management agreements and similar arrangements involving 800 MHz licensees, and issues ancillary thereto.

As noted in its Comments filed with respect to the Further Notice of Proposed Rulemaking in this proceeding,[2/] PCC is in the business of providing construction and management services to various licensees in the commercial mobile radio services,

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[1/] 9 FCC Rcd ____ (FCC 94-191, released July 20, 1994) ("SFNPRM").

[2/] 9 FCC Rcd ____ (FCC 94-100, released May 20, 1994) ("FNPRM" or "Spectrum Cap Notice"). In the course of preparing and negotiating management contracts and in providing management services to its customers, PCC has developed a familiarity with the issues raised by the SFNPRM which will be of assistance to the Commission. PCC has installed and/or operated 800 MHz SMR systems pursuant to its management contracts.

primarily 800 MHz SMR systems. Thus, PCC's qualifications are a matter of public record.

I. BEFORE IT CAN APPLY ANY PCS OR CMRS SPECTRUM CAP TO MANAGEMENT AGREEMENTS, THE COMMISSION MUST DEFINE WHAT MANAGEMENT AGREEMENTS COMPLY WITH ITS INTERMOUNTAIN MICROWAVE CRITERIA IN THE LIGHT OF TODAY'S COMMUNICATIONS ENVIRONMENT.

The SFNPRM (at paragraphs 4-11) requests comment on whether management agreements (arguably in compliance with the Commission's Intermountain Microwave criteria) should be found to create attributable interests for application of any PCS- or CMRS-spectrum cap. As a threshold matter, PCC asserts that the Commission cannot rationally answer that question until it affirmatively defines what sort of management agreements comply with the Intermountain Microwave criteria.

A. The Commission must Evaluate its Intermountain Microwave Criteria in the Context of the Modern Communications Environment.

Intermountain Microwave was decided in 1963, at a time when the land-mobile communications industry consisted of stand-alone transmitters, or in what then were called "complex" systems, limited numbers of transmitters serving at most an entire metropolitan area. The technology was simple. For the most part, each licensee constructed, operated, and maintained its own radio equipment. In short, it was a "Mom-and-Pop" business environment, run by guys in windbreakers and baseball caps.

Today's communications environment is radically different. Integrated land-mobile communications systems covering entire regions of the country (e.g., the state of California, the

Northeastern corridor from Boston to Washington) are the norm, with nationwide (or multinational) coverage commonly available. The technology is complex. The level of expertise and training required to construct, operate, and maintain such communications systems is much greater than it used to be. Similarly, the business and financial acumen to manage these systems has greatly increased.

Because of these changes in the communications business, a licensee's proper level of involvement in running its business has similarly changed.[3/] Licensee principals just cannot have the same hands-on involvement with their communications systems that they did a generation ago. Accordingly, licensees today must either develop a substantial in-house staff, retain third-party management firms (such as Motorola, PCC, and numerous others), or use a combination of in-house and third-party personnel to construct, operate, maintain, and manage their systems.

PCC respectfully suggests that the Commission should be guided by one fundamental principle: Third-party management contracts are an essential component of today's communications environment. The Commission accordingly must adopt control and real-party-in-interest criteria which are consistent with existing communications business practices.

[3/] By way of analogy, PCC would note that Henry Ford may have built his first car by hand, but he certainly didn't work on the assembly line.

B. The Commission Must Have Control and Real-Party-in-Interest Criteria Which Produce Rational Results in the Four Separate Contexts in Which Such Issues Arise.

A further complication to the proper application of the Intermountain Microwave criteria is that control and real-party-in-interest issues will arise in four different contexts. Those contexts are the combinations of (a) pre-grant (applicant) activities versus post-grant (licensee) activities and (b) activities pursuant to a bona fide formal agreement between the parties versus activities performed absent any such formal agreement. Those four contexts raise different policy concerns, and should receive a different levels of Commission scrutiny.

The opportunity for a violation of the Commission's Rules (whether intentional or inadvertent) is far greater when the parties take actions without a bona fide written agreement between themselves, defining the scope of the actions taken and the level of applicant or licensee control, than when such an agreement exists. For this reason, the existence of a bona fide written agreement between the parties should reduce substantially the level of Commission scrutiny.[4/]

[4/] This position itself needs to have some case-by-case exceptions. The written agreement must be a bona fide, commercially reasonable document which indicates the parties' good faith intention to comply with the Commission's rules and policies. The conduct being considered must fall within the scope of the agreement, and generally must be consistent with the terms and intent of the agreement. Assuming none of those exceptions are applicable (which PCC believes will be the norm), then the Commission's review of the conduct at issue should stop with its review of the controlling agreement.

Similarly, the opportunity for a violation of the Commission's Rules (whether intentional or inadvertent) and the magnitude of any violations is likely greater during the application (pre-grant) stages than after the license has been issued (post-grant). Prohibited conduct which distorts the Commission's licensing process affects not only the applicant at issue, but the Commission's licensing processes and all other applicants as well. Further, preparing and prosecuting applications involves much less complexity than running radio systems, so that any ambiguities of conduct are minimized. Thus, a higher level of scrutiny is warranted for pre-grant conduct.

These distinctions may be readily applied to the six Intermountain Microwave criteria in each of the four contexts:

Intermountain Microwave Criteria	Context			
	Pre-grant, no agreement	Pre-grant, agreement	Post-grant, no agreement	Post-grant, agreement
Daily operations	N/A	N/A	Actual conduct	Terms of agreement
Policy decisions	Actual conduct[5/]	Terms of agreement	Actual conduct	Terms of agreement
Personnel	Actual conduct[6/]	Terms of agreement	Actual conduct	Terms of agreement

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5/ The only "policy decision" properly considered in a pre-grant context is the review and execution of applications and amendments to be filed with the Commission. Manifestly, any applicant properly can retain a consulting engineer or communications counsel to prepare its applications and amendments, and most applicants in fact do so.

6/ The personnel decisions made in a pre-grant context refer to the selection, retention, and dismissal of engineers, attorneys, and other third parties used to prepare and prosecute the application.

Intermountain Microwave Criteria	Context			
	Pre-grant, no agreement	Pre-grant, agreement	Post-grant, no agreement	Post-grant, agreement
Financing	Actual conduct[7/]	Terms of agreement	Actual conduct	Terms of agreement
Monies & profits	N/A	N/A	Actual conduct	Terms of agreement
Use of equipment	N/A	N/A	Actual conduct	Terms of agreement

The Commission's clear explanation of these distinctions and its adjustment to the Intermountain Microwave criteria to the specific facts of each context will assist both licensees and their managers in complying with the Intermountain Microwave criteria.

C. Both Licensees and Management Companies Need a Degree of Certainty in their Business Relations; The Commission Should Adopt Safe-Harbor Provisions For Management Contracts Involving Its Licensees.

The Commission should take affirmative steps to minimize the occurrence of Intermountain Microwave issues in the future. As described above, the modern communications environment commonly requires that licensees enter into management contracts, and those contracts frequently involve millions of dollars of assets and revenue. The public interest will be well-served if those parties may do so without fear of a subsequent Commission investigation as to unauthorized transfers of control.

The Commission's cogent description of the "safe-harbor" provisions for the insulation of alien owners in limited partnerships and corporations subject to Section 310(b) of the Communi-

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7/ "Financing" in the pre-grant context refers to payment of the costs of preparing and prosecuting the application.

cations Act illustrates the type of guidance now needed by licensees and management companies.[8/]

In the context of management agreements, PCC believes that the following mandatory provisions would provide a safe harbor for such agreements and be in full compliance with Commission requirements:

1. The licensee may remove the management company upon substantial misconduct or uncorrected violation of Commission rules without penalty.[9/]

2. The licensee must review and sign all applications, amendments, and similar filings with the Commission, and may obtain whatever changes it deems desirable in such documents.

3. The licensee may inspect all physical facilities, books and records, and other assets used in connection with its licensed system at any time, without prior notice.

4. The licensee must retain control of all major policy decisions, including the sale of the licensee or the system, mergers and joint ventures with others, and the annual construction and operating budget. Conversely, the management company would not violate Commission rules by making operational decisions consistent with the budget and the management agreement.

[8/] See Wilmer & Scheiner, 103 FCC 2d 511 (1985), reconsidered in part, 1 FCC Rcd 12 (1986). In these decisions, the Commission told its licensees what provisions in ownership documents were required to provide proper insulation of aliens, and what provisions were prohibited. Subsequently, litigation of alien insulation has been substantially eliminated, and the remaining litigation has been limited to the legal issue whether a specific ownership document provides such insulation.

[9/] Payment of outstanding bills for services previously rendered would not be deemed a penalty.

5. The licensee bears the ultimate risk of loss and the possibility of profit from operations of the system or sale of the system and the license.[10/]

6. The licensee must be able to terminate the management contract within ten (10) years of its effective date or last renewal without penalty.

7. The management company cannot hold a veto power over the licensee's powers under the agreement. If the manager holds a bona fide ownership interest in the licensee, it may have whatever power arises from its ownership interest and not from the management agreement.

8. Existing management agreements amended to be in compliance with these requirements within a reasonable period of time from the adoption of the safe-harbor rules (say, six months) would provide a safe harbor for prior conduct in the absence of on-going Commission proceedings or egregious violations of the Commission's rules or policies.

The adoption of these or substantially similar criteria should eliminate the difficult, fact-sensitive litigation now common in real-party-in-interest litigation.

These safe-harbor provisions will serve the public interest by permitting licensees to obtain the best practicable management and level of integration for their systems without undue concern for ex post facto Commission inquiry into their management practices.

[10/] In this context, bona fide financing arrangements and fixed-fee or percentage of revenue management contracts would not be deemed to remove the licensee's ultimate risk of profit or loss. Nor would the licensee be required to have personal liability for the losses, so long as any contractual liability was commercially reasonable or consistent with industry practice.

II. MANAGEMENT AGREEMENTS SHOULD NOT BE APPLIED TO NON-PCS, NON-CMRS SPECTRUM LIMITS, SUCH AS THE 800 MHz 40-MILE RULE.

Paragraphs 67 through 73 of the FNPRM discuss the application of the existing 800 MHz SMR licensing limitations in to context of SMR systems designated as Commercial Mobile Service Providers.[11/] In general, the FNPRM correctly proposes eliminating those limitations for 800 MHz CMRS licensees, and PCC concurs in that proposal. However, to the extent that such limitations are retained, the Commission should not apply any "attribution by management contract" to find violations with such 800 Mhz limitations.

As is common in the 800 MHz SMR industry, PCC has entered into management agreements based on the Commission's current practices, e.g., that bona fide management agreements are not attributable and cannot cause violations of the Commission's 800 MHz licensing rules. A retroactive reversal of this policy would injure numerous licensees -- those managed not only by PCC, but also by most other SMR companies -- who have relied upon this policy. Such a reversal would produce substantial disruption in the industry, and would not serve the public interest.[12/]

[11/] Those limitations are the requirements that SMR systems demonstrate loading as a condition for obtaining additional blocks of spectrum and for obtaining multiple licenses at less than 40-mile intervals. See FNPRM, ¶¶71-72 & nn. 127-129; Sections 90.623(c), 90.631(c), 90.627(b), and 90.633(e) of the Commission's Rules.

[12/] Conversely, no similar policy limitations apply with respect to PCS-only or all-CMRS spectrum caps. PCS is a new service, and (based on the narrowband nationwide PCS auctions) is likely to be a "rich man's club" in any event. Such licensees (continued...)

CONCLUSION

Accordingly, PCC Management Corporation respectfully requests that the Commission modify its Intermountain Microwave criteria as set forth herein, adopt "safe harbor" provisions for contracts to manage Commission-licensed radio facilities, and not apply any management-agreement attribution rules to non-PCS, non-CMRS spectrum caps.

Respectfully Submitted,

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12/ (...continued)
are unlikely to need third-party managers. Similarly, managed 800 SMR licensees are unlikely to be limited by the proposed 40 MHz CMRS spectrum cap.